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No. 99-1134

IN THE

Supreme Court of the United States

October Term, 1999

MELKA MARINE, INC.,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit

Reply to Brief in Opposition

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Statement as to Corporate Status

Petitioner, Melka Marine, Inc. is not a parent, subsidiary or affiliate of any company.

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Argument

The focus of this Petition is the denial of the delay costs incurred by Melka Marine that the government agreed to pay Melka Marine through the "Suspension of Work" clause in the contract.

Said "Suspension of Work" clause (April 1984) clearly provides that "an adjustment shall be made for any increase in the cost of performance of this contract" and states:

> "(a) The Contracting Officer may order the Contractor in writing to suspend, delay, or interrupt all or any part of the work for such period of time as he may determine to be appropriate for the convenience of the Government.
>
> "(b) If the performance of all or any part of the work is for an unreasonable period of time, suspended, delayed, or interrupted (1) by an act of the Contracting Officer in the administration of this contract, or (2) by his failure to act within the time specified in this contract (or within a reasonable time if no time is specified), an adjustment shall be made for any increase in the cost of performance of this contract (excluding profit) necessarily caused by such unreasonable suspension, delay, or interruption and the contract modified in writing accordingly . . . ."

Melka Marine stated on page 29 of its Petition: "Any costs recovered through any contract modifications have not been claimed."

Thus, any reference to contract modifications in the Brief for the United States in Opposition are simply additional background information about the performance of the contract and are not related to the issue in this petition as to why the government is denying Melka Marine's delay costs. The government appears fixated on the contract modifications which have already been resolved by the government. It clearly appears that the government is attempting to side-step the issue in this case; the government does not appear willing to accept responsibility for paying for the delay costs that the government agreed to pay Melka Marine through the "Suspension of Work" clause.

The question presented by the government on page (I) of the Brief for the United States in Opposition implies that Melka Marine was not on standby from November 29, 1994 to January 4, 1995. Being under a "Suspension of Work" order can be akin to being pregnant; a contractor is either under a "Suspension of Work" order or not under a "Suspension of Work" order. In the instant case, it is clear that Melka Marine was under a "Suspension of Work" order for the work

included in the dredging and breakwater portions (71%) of the contract. The Federal Circuit has previously stated that "the 'standby' test focuses . . . on suspension of work on the contract" (*Interstate General Government Contractors v. West*, 12 F.3d 1053, 1057 (Fed. Cir. 1996)); "Satellite was required to remain on 'standby' during suspension of work, i.e., to be available to resume work promptly upon the government's instruction." (*Satellite Electric Co. v. Secretary of the Navy*, 105 F.3d 1418, 1420 (Fed. Cir. 1997); "The standby test does not require that the contractor's work force be idle." (*Altmayer v. Johnson*, 79 F.3d 1129, 1134 (Fed. Cir. 1996). The government has chosen to ignore these points raised in the Petition and Melka Marine's arguments in support of *Eichleay* damages.

The dilemma that Melka Marine has faced in attempting to recover *Eichleay* damages from the government is that the guidelines are in a constant state of change. Judge Hodges of the trial court recognized the dilemma and stated:

> ". . . I am always hesitant to grant one of these motions that the government makes at the end of every case, Plaintiff's case, because it's just

a waste of everyone's time if it comes back from the circuit and, in effect, saying, well, you should have heard what the government had to say.

". . . [B]ut I just don't see legally, almost no matter what the government puts on, you are going to be able to get over that threshold. And, again, I'm not saying that I think it's fair, but we have very few equitable powers in this Court . . .

"I don't know what will happen with the Satellite line of cases. My own view is that they should be revisited, but that's not my job and it's not my responsibility. But I just don't know any other way to interpret the law that I have to apply at this stage.

"And if they do change it later on, that's even more unfortunate that Melka was caught in the interim phase . . . I will grant the government's motion . . .

. . .

"And with regret. I do feel that it's not entirely fair, but, again, that's not the issue before me." (Pages 116-118 of trial transcript, Nov. 24, 1997)

In its Brief for the United States in Opposition, the government repeatedly refers to the February 2, 1995 meeting. The contract modification POOOO1 clearly states that Melka

Marine may pursue claims for the time period up to March 30, 1995. Contract modification POOOO1 was issued as a result of the discussions and negotiations between the parties concerning the work being delayed until October 15, 1995. As this court is well aware, the interpretation of a contract is a question of law. Likewise, the interpretation of contract modification POOOO1 is also a question of law. At the time of the delay, both Melka Marine and the government agreed through contract modification POOOO1 that Melka Marine could claim up through the date of contract modification POOOO1. See pages 9-10 of Petition. Melka Marine gave up rights to pursue other additional claims in exchange for said language such as agreeing not to file delay claims after March 30, 1995. The contract between the parties clearly warned Melka Marine that:

> "No change in the scope or within the scope, of this contract, which would effect a change in any term or provision of this contract, shall be made, except by a modification executed by the Contracting Officer." (See the contract, section 01010, page 8)

As Melka Marine previously stated on page 10 of its Petition, Melka Marine confirmed through its letter dated April 4, 1995 that Melka Marine intended to file claims from the commencement of the contract through March 30, 1995. The government has not addressed the language of POOOO1. It is noteworthy that the Contracting Officer was able to modify the November 29, 1994 "Suspension of Work" order two days after the same was issued on December 1, 1994; *arguendo* (although Melka Marine contends the February 2, 1995 meeting included only discussions of delaying the work until October 15, 1995), it took the Contracting Officer almost two months to issue the contract modification POOOO1 committing the government to the October 15, 1995 date.

Examples of other cases dependent upon permits are *Henderson, Inc.*, DOTCAB Nos. 2423, 2500, 94-2 BCA ¶ 132,986 and *Garcia Concrete, Inc.*, AGBCA No. 78-105-4, 82-2 BCA ¶ 16,046.

It is also worth noting that there are different types of overhead charges. See *Altmayer v. Johnson*, 79 F.3d 1129, 1132-1133 (Fed. Cir. 1996), wherein the court discussed the *Eichleay*

formula and the fixed percentage rate (or direct) formula for calculating overhead costs.

In response to the footnote at the end of the Brief for the United States in Opposition and the fact that part of this action was remanded by the Federal Circuit, petitioner refers to rulings where certiorari has been granted because it was "fundamental to the further conduct of the case". *See Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 685 n.3 (1949); *U.S. v. General Motors Corp.*, 323 U.S. 373, 377 (1945). Furthermore, Melka Marine is a small contractor (volume during the period from August 1, 1994 through July 31, 1995 (fiscal 1995) was approximately $600,000; volume during the period from August 1, 1995 through July 31, 1996 (fiscal 1996) was approximately $700,000) and can only afford so many rounds of litigation. For the premise of "the danger of denying justice by delay", see *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 153 (1964); *also see Local 28 Sheet Metal Workers' Internat. Assn v. EEOC*, 478 U.S. 421, 441 (1986) (this Supreme Court held that because petitioner did not seek certiorari from the Supreme Court on an earlier part of a decree of

the Court of Appeals, the petitioner was bound by said earlier part of the decree of the Court of Appeals). In addition, in *D.C. Federation of Civic Associations v. Volpe*, 459 F.2d 1231, 1267 (D.C. Cir. 1971), the appeals court noted that the prior failure of the government to seek review by the Supreme Court of the United States of a prior decision requiring remand to the district court became the law of the case. *Also see Lytle v. Commissioners of Election of Union County*, 541 F.2d 421, 425 (4th Cir. 1976) wherein the appeals court stated that where review of a prior decision of the appeals court was not sought before the Supreme Court of the United States, the prior decision of the appeals court became the law of the case.

The instant case illustrates how the government can deprive a contracting party of delay costs that the government agreed to pay by contract for a delay that was clearly unreasonable and clearly the cause of the government. Even though it is undisputed that the government awarded a contract without a dredging permit and extended the contract from the scheduled 81 days to 500 days and even though Melka Marine,

was only able to perform 13 percent of the original contract work after mobilization, the government steadfastly maintains that it is not required to pay the delay costs of Melka Marine. Clearly, the delay of the dredging and breakwater work items (71% of contract) delayed work that was on the critical path. It is important that parties contracting with the government have some sense of confidence as to how their contract is to be interpreted in the event the government issues a "Suspension of Work" order; without stability in the contracting process, the contractors may increase their prices to the government to compensate for the increased risk.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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